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Kevin L. Smith

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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 84A01-0708-CR-373

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April 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kevin L. Hampton appeals following his convictions for two counts of Murder,¹ a felony. Specifically, Hampton argues that the convictions must be reversed because the trial court improperly precluded him from proceeding pro se. Hampton also argues that the trial court erred in granting the State's motion to allow the two lead detectives who independently investigated the separate murders to remain in the courtroom despite an order for the separation of witnesses. Finding no error, we affirm the judgment of the trial court.

FACTS

In 2004, Hampton spent part of the Thanksgiving holiday with eighteen-year-old Tanette Dickison and her friend, Cassie Harris, in Vigo County. Shortly thereafter, Hampton borrowed Nanette McAdory's 1991 Cadillac automobile. On the Sunday after Thanksgiving, one of Dickison's roommates, Avery Seger, observed that a "black guy," who had "been there a few days before," came to the door, and left with Dickison. Tr. p. 265-66. Seger noticed that the man was driving a "light color Cadillac." *Id.* at 265-68. At approximately 9:00 p.m. that evening, Dickison arrived at the Dew Drop Inn but left because she did not have any identification.

At 11:00 p.m., Kaydee Denny saw Harris and Dickison in the backseat of a silver Cadillac at a Taco Bell restaurant. Hampton was in the front passenger seat of the vehicle and his friend, Tim Bailey, was in the driver's seat. This was the last time that

¹ Ind. Code § 35-42-1-1.

Dickison and Harris were seen alive. Several days later when Hampton returned the Cadillac to McAdory, she noticed that the vehicle was muddy, the muffler was missing, and the front end was damaged.

On November 29, 2004, Dan Vogel returned to his home in Brazil at approximately 6:30 p.m. after work. Vogel noticed a pair of slippers and a wrapper from a Taco Bell restaurant lying in his driveway. He picked up the items and placed them in the back of his truck. The following afternoon, Vogel discovered a woman's body lying face down in a nearby pond. It was subsequently determined that the body was that of Dickison, and Indiana State Police Detective Tony Guinn was assigned as lead investigator in the case. Preliminary testing revealed that the Taco Bell wrapper that Vogel found in his driveway contained partially eaten pieces of a burrito or tortilla.

An autopsy revealed that Dickison had been dead for one to three days. The examination also revealed that Dickison had died from manual strangulation based on abrasions and contusions on her face and neck. Dickison's stomach contained pieces of finely shredded lettuce and what appeared to be small bits of flour tortilla. Moreover, the examination also revealed that Dickison sustained a substantial amount of hemorrhaging in both eyes and abrasions on her face, neck, and upper arm. When Detective Guinn spoke briefly with Hampton on January 12, 2005, Hampton claimed that he had "been around" Dickison "a couple of times." Tr. p. 526.

On February 10, 2005, John Bowling was working with a surveying crew on the Alcan Aluminum property in Vigo County when he discovered Harris's remains near a creek. Harris's body was in an advanced state of decomposition, and it had been there

from one to three months. An autopsy revealed fractures and contusions in Harris's neck, laryngeal area, and hyoid bone. It was determined that Harris had been strangled.

On February 22, 2005, Detective Guinn and Terre Haute Police Detective Starla Neidigh—the lead detective assigned to investigate Harris's death—interviewed Hampton following his arrest on a warrant for receiving stolen property. Hampton told the detectives that he had been with Dickison on Thanksgiving Day, but denied being involved in her death. Hampton also stated that, although he was acquainted with Harris, he had not seen her for “a long time.” Id. at 610.

On March 3, 2005, Hampton called Tim Bailey from the jail phone. During the taped conversation, Hampton told Bailey that he was in trouble and Bailey responded that he was “trying to get that stuff out of the house.” Id. at 636. Hampton and Bailey discussed cleaning the house and removing the furniture, blankets, and towels.

Thereafter, the police received reports of individuals coming and going from Hampton's house and removing various items from it. As a result, the police executed a search warrant on the residence. During the search, the police did not find towels or bed linens. However, when the couch cushions were turned over, the police officers observed a substance that they suspected was blood. Presumptive tests were positive for blood on cuttings and swabs that were taken from two mattresses in the bedroom, the end of the couch, cushion covers from a chair in the living room, and couch cushion covers. Further testing revealed that Harris's DNA was present on the cushion covers.

In the spring of 2005, the police located McAdory's silver Cadillac, which she had sold to a coworker. Presumptive tests revealed the presence of blood on one of the floor

mats, the backseat cover of the driver's seat, the headrest of the driver's seat, the rear floor carpet on the driver's side, and the right rear seat cushion. During that period, Hampton was incarcerated in the same cell block with Ralph Churchill, an individual whom Hampton had known for approximately twenty-five years. When Hampton returned to the cell after his blood was drawn for DNA testing, he told Churchill that DNA could link him to Dickison and he "did away with" her because she "knew too much." Id. at 1064-65. Hampton also told Churchill that the silver Cadillac could link him to the disappearances of both Harris and Dickison. Hampton further explained that he was angry with Bailey because the couch had not been removed from the residence and he believed that Bailey had "left him out to dry." Id. at 1065.

During the summer of 2005, Hampton was incarcerated with Timothy Wilcox, whom he had known for several years. At some point, Hampton told Wilcox that after Harrison and Dickison left the Dew Drop Inn one evening, they came to his residence and smoked crack cocaine. Hampton then stated to Wilcox that he was tired of the women "taking his dope" and he "snapped." Id. at 1108. He told Wilcox that he choked Dickison and watched "the light go out of her eyes." Id. at 1109. Hampton then said that he placed Dickison's body in the backseat of the car, drove around for a while, and dumped the body in a pond in Brazil. Hampton also told Wilcox that he choked Harris to death because she was a "witness" and was "not taking any chances." Id. at 1109-10.

On July 12, 2005, Hampton was charged with the murders of Harris and Dickison. Thereafter, on December 20, 2006, the trial court scheduled Hampton's jury trial to commence on June 18, 2007. On January 11, 2007, Hampton filed a "Motion to Allow

Defendant to Participate at Trial as Co-counsel,” which the trial denied without a hearing. Appellant’s App. p. 144. Thereafter, on April 26, 2007, Hampton filed another motion (Faretta motion), requesting that he be permitted to participate as co-counsel at trial.² Id. at 149. In that motion, Hampton cited Faretta v. California, 422 U.S. 806 (1975), asserting that “in all criminal prosecutions, the accused shall have the right to . . . be heard by himself and counsel.” Id. at 150. The trial court denied that motion on May 14, 2007.

That same day, a pre-trial conference was held, and Hampton’s counsel indicated that the Faretta motion was actually intended as a request to proceed pro se. Thus, Hampton’s counsel orally moved for a continuance of the trial date based upon the request to proceed pro se. In response, the trial court indicated that the Faretta motion was a request for hybrid representation, not a request to proceed pro se, and that it had been denied as such. The trial court also denied Hampton’s oral motion to continue the trial. The trial court further informed Hampton that if he so desired, he should file a written motion requesting to proceed pro se. The trial court further indicated that it would conduct the relevant and proper inquiries at a subsequent hearing.

On May 29, 2007, defense counsel provided Hampton with a motion to proceed pro se for Hampton to file if he chose to do so. At that time, Hampton was advised to file the motion “sooner rather than later.” Tr. p. 14, 25-27. Hampton elected not to file the

² Indiana does not recognize a constitutional right to such “hybrid” representation, which has been defined as the right to proceed pro se and to be represented by counsel at the same time. Lockhart v. State, 671 N.E.2d 893, 898 (Ind. Ct. App. 1996).

motion for self-representation at that time because he indicated that he desired to pursue an interlocutory appeal of the denial of his motion for hybrid representation.³

On June 11 and 12, 2007, Hampton filed motions requesting that he be allowed to proceed pro se and a motion for a continuance, indicating that he would require “some substantial additional time to prepare for trial once his Faretta motion was granted.” Appellant’s App. p. 197-99, 204-05. At a subsequent hearing, Hampton stated that he required “some months, probably four,” to prepare for trial because he wanted to depose various individuals and call witnesses who were not on the original witness list. Tr. p. 15-16. By the time Hampton filed these motions, the trial court had already summoned 225 potential jurors to appear for his trial, which was scheduled to commence in less than one week. Additionally, the State had already subpoenaed its witnesses.

The trial court denied Hampton’s request, concluding that “filing the motion in a double murder case six (6) days prior to trial is untimely.” Id. at 228-29. In reaching that conclusion, the trial court found that Hampton had been aware of his right to proceed pro se for months but chose not to exercise that right until six days before trial. The trial court also determined that Hampton offered no compelling reason as to why he did not file the motion until the week before trial and that his actions were “nothing more than an attempt to manipulate the trial process” and an “attempt to create error in the record” if convicted. Id.

³ To our knowledge, Hampton did not proceed with that interlocutory appeal.

Prior to trial, the State filed a motion requesting that both Detective Guinn and Detective Neidigh be declared essential witnesses so they could remain in the courtroom during the trial. The State pointed out that separate probable cause affidavits had been filed in each case, that Dickison's body was found in Clay County in November 2004, that Harris's body was discovered in Vigo County in February 2005, and that separate investigations into each homicide had been conducted. The State also noted that dozens of leads were followed independently and jointly by the detectives during the investigations. Moreover, of the twenty-two witnesses that the State intended to call, only four were involved in both investigations, and several other civilian witnesses had been interviewed by only one of the lead detectives during the investigations.

The trial court granted the State's motion to have both officers declared essential witnesses, but it otherwise granted Hampton's motion for a separation of witnesses. Following the presentation of evidence, Hampton was found guilty on both counts of murder. Thereafter, the trial court sentenced Hampton to sixty-five years on each count and ordered the terms to run consecutively to each other. Hampton now appeals.

DISCUSSION AND DECISION

I. Proceeding Pro Se

Hampton first claims that the trial court abused its discretion in denying his motion to proceed pro se. Specifically, Hampton maintains that he "clearly and unequivocally stated he wanted to represent himself because he wanted to control trial strategy." Appellant's Br. p. 12. Moreover, Hampton contends that his motion should

have been granted because he knowingly, intelligently, and voluntarily waived his right to be represented by counsel.

In resolving this issue, we initially observe that a criminal defendant has the right to decline the assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806 (1975); Stroud v. State, 809 N.E.2d 274, 279 (Ind. 2004). However, such a right is not absolute. Among other things, the right must be invoked within a reasonable time before the first day of trial. Russell v. State, 270 Ind. 55, 64, 383 N.E.2d 309, 315 (1978). What constitutes a reasonable amount of time is fact-sensitive and will vary according to the nature and complexity of the case. Id. at 63-64, 383 N.E.2d at 315. In essence, “the more complicated the case and the more involved the pre-trial proceedings, the earlier a ‘reasonable’ assertion will naturally be, and vice-versa.” Id. This requirement is intended to prevent assertions of the right by defendants who “merely seek [] delay for its own sake.” Id. The right to proceed pro se is not to be used as a delay tactic, for disruption, distortion of the system, or for manipulation of the trial process. Indeed, courts must be wary of defendants asserting the right to self-representation solely to delay proceedings or to create an issue for appeal. Stroud, 809 N.E.2d at 279.

Here, the record shows that Hampton’s case had been pending for nearly two years before he made a request to proceed pro se. Tr. p. 8, 12-13, 28-29. Hampton admitted that he was aware of his right to represent himself in early 2007, and he knew of the holding in Faretta no later than April 2007 when he cited that case in his motion requesting hybrid representation. Id. As discussed above, Hampton’s counsel gave him a copy of a motion for self-representation to sign in May 2007. However, Hampton waited

until June 11, 2007, to make such a request—less than one week before the scheduled start of the trial.

Contrary to Hampton’s contentions, the case was complicated, and it involved significant DNA and serology evidence. The State’s final witness list contained forty-six individuals, and most of them were called to testify at trial. Appellant’s App. p. 210-11. In our view, Hampton’s request to proceed pro se six days before his trial was not made within a “reasonable time.” See Stroud, 809 N.E.2d at 280 (concluding that the trial court properly denied the defendant’s request to proceed pro se for lack of timeliness in a multiple murder case where the defendant filed the motion seven days before the scheduled trial date).

We further note that the record supports the trial court’s conclusion that Hampton’s request to proceed pro se was made solely for the purpose of delay. As previously discussed, Hampton had the knowledge and means to assert his right to self-representation months before he asserted the right, yet he chose to file the motion less than a week before trial. Hampton informed the trial court that once his Faretta request was granted, he would need “substantial additional time” to prepare for trial because he wanted to depose and call additional witnesses. Appellant’s App. p. 197-99, 204-05. Indeed, Hampton specifically stated to the trial court that he intended to ask for a continuance when he asserted his right to proceed pro se. Tr. p. 13. Although Hampton maintains that the trial court should have asked whether he wanted to proceed pro se even if the continuance was denied in order to test the genuineness of the request, there was no

need to do so because Hampton had already made it clear that a substantial delay in the proceedings would be required to enable him to present a defense.

In light of these circumstances, it was reasonable for the trial court to conclude that Hampton was attempting to manipulate the proceedings through the last-minute request and his claim for additional time. Thus, we conclude that the trial court properly denied Hampton's request to proceed pro se.

II. Separation of Witnesses

Hampton next argues that his convictions must be reversed because the trial court abused its discretion by permitting the lead detective in each case to remain in the courtroom even though his motion for a separation of witnesses had been granted. Specifically, Hampton claims that the murder investigations were not extensive and crucial enough to warrant a determination that both detectives were essential witnesses for the purpose of remaining in the courtroom. Therefore, Hampton argues that he was prejudiced by the presence of both detectives at counsel table and his convictions cannot stand.

In resolving this issue, we initially set forth the provisions of Indiana Evidence Rule 615:

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

The basic premise of Rule 615 is that, upon the request of any party, witnesses should be insulated from the testimony of other witnesses. Long v. State, 743 N.E.2d 253, 256-57 (Ind. 2001). The determination of whether a witness qualifies for exception from a separation of witnesses order falls within the trial court's discretion and is reviewed only for an abuse of discretion. Id.

Under the second exception to the rule, the State is permitted to designate an investigating officer as its party representative. In construing this rule, this court has determined that only one person may be designated as a party representative. However, an additional investigating officer may remain in the courtroom if the trial court finds that he or she is an essential witness in the case. Stafford v. State, 736 N.E.2d 326, 331 (Ind. Ct. App. 2000). In the event of a Rule 615 violation, the correct approach to a violation of is to presume prejudice. Id. However, that presumption can be overcome if the non-movant can show that there was no prejudice. Id.

We further note that the Rule 615 exceptions are to be narrowly construed. Long, 742 N.E.2d at 256. Specifically, a party seeking to exempt a witness from exclusion as essential to the presentation of the party's cause under the third exception to the rule must convince the trial court that the "witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney would not effectively function without the presence and aid of the witnesses." Id. As the Long court explained, "[a]n exclusion under clause (3) would thus be inappropriate in cases where a person excluded under clauses (1) or (2) can provide the expertise and knowledge adequate to assist

counsel. Likewise, permitting a party to retain more than one witness in the courtroom under clause (3) to assist during trial would be especially questionable.” Id.

In Long, our Supreme Court affirmed the trial court’s decision that allowed both a State Police Trooper and an FBI agent to remain in the courtroom to assist the State at the defendant’s murder trial. The evidence established that the police officers had divided many of the tasks in the investigation, that the case involved forty-five non-police, non-expert witnesses, and that sixty-six exhibits were admitted into evidence during the seven-day trial. Id. at 257. Moreover, the police interviewed over 500 witnesses and conducted thirty searches during the multi-year, multi-state investigation. Id. at 256-57. Likewise, in Kirby v State, 774 N.E.2d 523 (Ind. Ct. App. 2002), this court affirmed the trial court’s order that permitted the State to have a second investigating officer in the courtroom where the evidence showed that the officer had participated in many of the 220 witness interviews that had been conducted during the investigation. Id. at 537-38.

Notwithstanding the results reached in Long and Kirby, Hampton directs us to our Supreme Court’s opinion in Osborne v. State, 754 N.E.2d 916 (Ind. 2001), in support of his contention that the trial court erred in permitting both detectives to remain in the courtroom during the trial. In Osborne, it was determined that an investigating officer was not “essential” to the presentation of the State’s case when the defendant was immediately apprehended after the crime occurred, confessed twice to the police, and “complicated facts, a plethora of witnesses, or an extensive investigation” were not at

issue. Id. at 926-27.⁴ However, the Osborne court ultimately concluded that the presumption of prejudice to the defendant under Rule 615 was overcome and the error was harmless when the overwhelming evidence included the defendant's confession, DNA evidence, and the testimony of an accomplice. Id. at 927.

Here, Hampton does not dispute the existence of separate investigations. Dickison's body was discovered in November 2004 in Clay County and the investigation into her death was conducted primarily by Clay County and Indiana State Police law enforcement officials. Tr. p. 306-06, 329-31, 481. Detective Guinn filed the probable cause affidavit with regard to that murder. On the other hand, Harris's body was discovered in February 2005 in Vigo County. Id. at 174-75, 546-50, 560-61, 605-06, 850-53. Vigo County and Terre Haute law enforcement officials were primarily responsible for performing that investigation, and Detective Neidigh submitted the probable cause affidavit with regard to that murder.

The evidence also established that both investigations were complex. Indeed, Detective Guinn, State Police Trooper Jared Nicoson, and Clay County Sheriff Michael Heaton testified at length about the many individuals who were investigated and questioned. Id. at 365-70, 374-83, 468-79. Also, because Dickison's body was discovered much earlier than Harris's body, a substantial portion of the investigation was conducted before the Terre Haute and Vigo County officials began working together.

⁴ This quote is taken from Justice Boehm's concurring opinion, which is also the majority opinion regarding the analysis of Rule 615, inasmuch as that part of the opinion was joined by Chief Justice Shepard and Justice Dickson.

The investigations surrounding the murders covered two counties and lasted more than six months. In both cases, many potential suspects and persons of interest were interviewed, several vehicles were searched, and numerous items were submitted to the forensic laboratory for testing. Moreover, while it was established that the murders were committed in November 2004, the charges were not filed against Hampton until July 2005. And, although Hampton made incriminating statements to fellow jail inmates, he never confessed to police. Finally, during Hampton's seven-day jury trial, the State called thirty-seven witnesses and offered nearly 150 exhibits.

In light of these circumstances, we find that it was reasonable for the trial court to conclude that both detectives were essential witnesses at Hampton's trial. Indeed, the evidence and investigations involving each case were complex and unique. As a result, neither detective could provide extensive assistance regarding both investigations, considering the limited involvement that each had in the other case. As a result, there was no Rule 615 violation, and we conclude that the trial court did not abuse its discretion in permitting both Detective Neidigh and Detective Guinn to remain in the courtroom at counsel table during Hampton's trial.⁵

⁵ As an aside, we note that even if a Rule 615 violation had occurred, it is apparent that the State has overcome any presumption of prejudice that Hampton might have sustained as a result of the trial court's alleged error permitting both Detective Neidigh and Detective Guinn to remain in the courtroom. Indeed, Hampton does not attack the credibility of either detective, and the State's case was based primarily on physical evidence, circumstantial evidence, and the testimony of the other witnesses at trial. See Stafford, 736 N.E.2d at 331 (observing that the presumption of prejudice was overcome when it was established that the testimony of the two police officers who remained in the courtroom during the defendant's trial was "primarily background and foundational").

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.